Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of MCI for	)	File No. CC Docket 96-98
Declaratory Ruling	)	DA 97-557

BELLCORE'S OPPOSITION TO MCI'S PETITION FOR DECLARATORY RULING

Bell Communications Research, Inc. (Bellcore) opposes MCI's Petition for Declaratory Ruling filed March 11, 1997. In its Petition, MCI is asking the Commission to ignore or effectively negate the intellectual property (IP) rights which a party may have in a network element utilized by an incumbent local exchange carrier ("ILEC") in the provision of a telecommunications service and to which the ILEC must provide access to its competitors pursuant to the Telecommunications Act of 1996 ("Act") and the FCC's First Report and Order. (In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC Aug. 8, 1996, at 61 Fed. Reg. 45476.) Without any supporting facts, legal precedent, or statutory language from the Act, MCI simply asserts that "the Commission should quickly and decisively hold that, as a general matter, IP rights of third parties are not implicated in the sale of unbundled elements." MCI Petition, at 7. The Commission should not accede to MCI's request.

MCI is asking the Commission to declare inapplicable the basic property rights of the owner of all or a portion of the IP embodied in a network element utilized by an ILEC when 1) the owner is a third-party rather than the ILEC itself and 2) access to the network element to use its capabilities is being sought by an entity which has not been granted permission by the third-party owner. The fact is that such network elements may consist of or incorporate software licensed from a third-party who still retains ownership of the underlying IP rights embodied in the software. Such underlying IP rights in the software may include, the copyright in the code or related documentation, patents that may govern the operation of the software or an interface to the network element, and any trade secrets embodied in the software or contained in the network element interface. Such licensing is common in both the telecommunications and computer industries and long predates the Act.

Nothing in the Act's unbundling provisions (Section 251(c)(3)), which require an ILEC to provide unbundled access to network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory" requires a third-party to grant a compulsory, royalty-free license to its IP. Such a requirement would in effect nullify the third-party's exclusive rights to its IP and would inhibit its ability to protect its IP from being used, copied, displayed, modified, disclosed, sold or offered for sale without its permission. If MCI, or other competitive carrier obtains access to the protected features, functions, interfaces and information contained in a software system ("Technical Information") and uses, discloses, displays, copies or transmits such "Technical Information" for its commercial benefit, that carrier is using the software system owner's

IP. MCI's reference to where physical "control" of the IP resides is irrelevant to whether the IP owner's rights have been violated by an entity's use of such IP rights without the IP owner's permission.

Congress did not intend the Act to "modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." (Section 601(c)91). Nowhere does the Act expressly provide the FCC with authority to nullify the exclusive right of a patent owner under Federal patent law to exclude others from using their invention, or the exclusive rights of a copyright owner under Federal copyright law to copy, modify, license or distribute its works (including software). The unbundling requirements imposed on the ILECs do not supersede rights granted to third parties by Federal copyright and patent law or rights conferred by state law to third parties in their trade secrets. Nor could Congress or the Commission constitutionally require third parties to forfeit their intellectual property rights without this constituting a compensable taking.

Finally, MCI suggests that if the IP rights of a third-party are implicated, it should be the ILEC's responsibility to seek an appropriate extension of rights to accommodate the competitive carrier. Whether or not this may be practical or desirable in specific instances, it is certainly not so in all cases such as where the third-party owner needs direct contractual privity with each user of its IP and the right to enforce its IP rights against each user itself. The Commission should not regulate how the owner of IP determines to contractually protect its rights.[1]

[1] *See further,* Comments of Bell Communications Research, Inc. in CC Docket No. 96-254, Feb. 24, 1997, at 6-7 and 12-7.

WHEREFORE, for the foregoing reasons, MCI's Petition for a Declaratory Ruling is without merit and should be denied.

Respectfully submitted,

BELL COMMUNICATIONS RESEARCH, INC.

By: _____

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Dated: April 15, 1997